

KLIEBENSTEIN

EXHIBITS 1-3

KLIEBENSTEIN

EXHIBIT 1

**TO BE FILED FOLLOWING
ENTRY OF ORDER ON
APPLICATION FOR LEAVE
TO FILE UNDER SEAL**

KLIEBENSTEIN

EXHIBIT 2

**TO BE FILED FOLLOWING
ENTRY OF ORDER ON
APPLICATION FOR LEAVE
TO FILE UNDER SEAL**

KLIEBENSTEIN
EXHIBIT 3

In The Matter Of:
*Pinkette Clothing, Inc. v.
Cosmetic Warriors Limited*

*Dr. Jonathan D. Hibbard
October 21, 2016*

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.:

PINKETTE CLOTHING, INC., 2:15-cv-04950-SJO-AJW

Plaintiff,

v.

COSMETIC WARRIORS LIMITED,

Defendant.

10
11 DEPOSITION OF DR. JONATHAN D. HIBBARD, a witness
12 called by and on behalf of the Defendant, taken
13 pursuant to Rules 26(b)(4) and 30(b)(1) of the
14 Federal Rules of Civil Procedure, before Maria P.
15 Manning, CSR and Notary Public in and for the
16 Commonwealth of Massachusetts, at O'BRIEN & LEVINE
17 COURT REPORTING SERVICES, 195 State Street, 5th
18 Floor, Boston, Massachusetts, 02109 on
19 October 21, 2016, commencing at 10:03 a.m.

1 A P P E A R A N C E S:

2

3 LTL ATTORNEYS LLP

4 (by David A. Crane, Esq.)

5 300 South Grand Avenue, 14th Floor

6 Los Angeles, California 90071

7 (213) 612-8900

8 david.crane@ltlattorneys.com

9 for the Plaintiff.

10

11 MERCHANT & GOULD P.C.

12 (by Heather J. Kliebenstein, Esq.)

13 3200 IDS Center

14 80 South Eighth Street

15 Minneapolis, Minnesota 55402-2215

16 (612) 332-5300

17 hkliebenstein@merchantgould.com

18 for the Defendant.

19

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22

23

24

1	I N D E X	
2	WITNESS:	
3	DR. JONATHAN D. HIBBARD	
4	Examination by:	PAGE
5	Ms. Kliebenstein	4
6	E X H I B I T S	
7	No.	
8	PAGE	
9	<u>Exhibit 262</u>	Rebuttal report of Jonathan D. 4
10	Hibbard, Ph.D.	
11	<u>Exhibit 263</u>	Dr. Joachimsthaler's report 80
12	Exhibits were retained by the Stenographer	
13	and returned to MS. KLIENBENSTEIN.	
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PROCEEDINGS
(WHEREUPON, Exhibit 262, received and
pre-marked for identification.)

JONATHAN D. HIBBARD

a witness, having been satisfactorily identified by the production of a driver's license, was first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. KLIENBENSTEIN:

13 Q. Good morning, Dr. Hibbard.

14 A. Good morning.

15 Q. Welcome to your deposition.

16 A. Thank you.

17 Q. Have you ever been deposed before?

18 A. Yes.

19 Q. How many times?

20 A. Several. Two or three. I can't remember.

21 | It's been a while.

22 Q. So you know the drill. I'll ask you

23 questions, you answer them. If you need a break at
24 any time, just let me know. If there's a question

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1 that you don't understand, feel free to ask me to
2 rephrase it.

3 Is this there anything today that would
4 prevent you from providing your full testimony?

5 A. No.

6 Q. So you mentioned that you've been deposed two
7 or three times before.

8 Can you recall what matters those depositions
9 took place in?

10 A. At the moment, no.

11 Q. How long ago were they?

12 A. Somewhere around nine, ten, twelve years ago.

13 Q. Were they civil lawsuits?

14 A. They were.

15 Q. Were you acting as an expert witness?

16 A. I was not.

17 Q. In what capacity were you acting?

18 A. I believe I was designated as a consulting
19 expert.

20 Q. So you were deposed or you weren't deposed?

21 A. I was deposed.

22 Q. You were deposed as a consulting expert.

23 And is that in both of those depositions you
24 were a consulting expert?

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1 Q. And the second is that the strength and the
2 status of the LUSH brand in the U.S. market was not
3 strong in 2003 to 2004.

4 Is that the second prong of your opinions in
5 this case?

6 A. Yeah. The second prong is that it's nowhere
7 near as strong as it potentially is in '15, '16.

8 Q. And it's limited to that time period, 2003 to
9 2004, correct?

10 A. The analysis I did was I tried to use 2003,
11 2004 data.

12 Q. To make a conclusion about the strength and
13 status of the LUSH brand in 2003 to 2004, correct?

14 A. Yes. Correct.

15 Q. And so this report does not express any
16 opinions on the status or strength of the LUSH brand
17 after 2004?

18 MR. CRANE: Objection. Vague.

19 THE WITNESS: Can you specify for
20 me a little?

21 BY MS. KLIENBENSTEIN:

22 Q. Sure. I'm just trying to understand the
23 temporal metes and bounds of your opinions in this
24 case. So in the second prong, your opinions talk

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1 about the strength and status of the LUSH brand for
2 2003 to 2004.

3 And so my question is your opinions about the
4 strength and status of the LUSH brand are limited to
5 that time period, 2003 to 2004?

6 A. I would say yes.

7 Q. So to ask the first question again, you don't
8 have any opinions in this report about the status and
9 strength of the LUSH brand after 2004?

10 MR. CRANE: Objection. Asked and
11 answered.

12 THE WITNESS: I think, I'm not
13 sure. I may have included a little bit
14 of 2005 in there. But certainly I did
15 not use any data, you know, that was
16 past 2003, 2004 or maybe a little in
17 2005.

18 BY MS. KLIENBENSTEIN:

19 Q. So moving on to paragraph 13, under
20 Section A.

21 To quote your report, it says, "I believe the
22 relevant time period in which to assess CWL's LUSH
23 Cosmetics/Toiletries brand status is 2003 to 2004 and
24 not 2013 to 2016?"

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1 That's based on law provided to you from
2 counsel, correct?

3 A. Correct.

4 Q. And let's assume that the law on that time
5 period, that only 2003 to 2004 is wrong. Let's just
6 assume that it's wrong.

7 Your criticisms based on that point would
8 then not be pertinent to this matter, correct?

9 A. (Pause.)

10 Q. And I'm not talking about the second prong of
11 your report, your own independent analysis of the
12 status in 2003, setting that aside.

13 This first area deals with your criticisms of
14 Dr. Joachimsthaler for not looking at 2003 to 2004,
15 correct?

16 A. My criticism for only looking at 2014, 2015,
17 '16 data. So that's my criticism of him.

18 Q. Okay. Because the relevant time period is
19 2003, 2004.

20 A. Correct.

21 Q. Based on the law that you've been provided.

22 A. Correct.

23 Q. And so my question is let's assume that that
24 law is incorrect, that looking at 2013 to 2016 is

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1 legally relevant to this case.

2 Do you understand that assumption?

3 A. Okay.

4 Q. Would your criticisms in this first part be
5 the same?

6 MR. CRANE: Objection. Incomplete
7 hypothetical. Vague and ambiguous and
8 confusing.

9 THE WITNESS: Answer or not?

10 MR. CRANE: You can answer to the
11 extent you understand the question.

12 THE WITNESS: Okay. So as I
13 understand your question, if the law is
14 not correct, then the analysis that
15 I've done tied to 2003, 2004 may not be
16 as useful.

17 BY MS. KLIENBENSTEIN:

18 Q. And looking at this flaw number one issue,
19 you say it may not be as useful. In what ways could
20 your analysis from paragraphs 13 through 53 be
21 useful, assuming that that law is wrong?

22 MR. CRANE: Objection. Incomplete
23 hypothetical.

24 Counsel, can you specify for the

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1 good thing.

2 Q. So let's move to the brand identity system.

3 This framework -- have you ever heard of this
4 framework before, before working on this case?

5 A. Yes.

6 Q. And what do you know about that framework?

7 A. I mean, I know about the framework. It's a
8 framework in branding.

9 Q. And what would that framework be used for?

10 A. I think you could use it for a number of
11 things. I guess you could use it to assess a brand.
12 Sort of like a brand audit.

13 Q. When you say a "brand audit," what does that
14 mean?

15 A. Basically trying to understand where the
16 brand is at now.

17 Q. What its target consumers would think about
18 it?

19 A. Yeah. Exactly.

20 Q. Have you ever used that framework before?

21 A. I have not. I've used elements of it, but I
22 haven't used Erich's particular framework.

23 Q. And what elements have you used of this
24 framework before?

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1 A. Can I look through and tell you?

2 Q. Oh, sure.

3 A. Okay.

4 Q. Yes. Feel free to look.

5 A. So the brand as person I've used, because
6 typically that's more referred to as brand
7 personality. So there's a large literature on brand
8 personality.

9 Q. Um-hmm.

10 A. And then brand as symbol. Again, it's sort
11 of a well-known literature on brand as symbol, so
12 that would be something that probably many
13 consultants, academics would use as a way to examine
14 brands.

15 Q. When preparing your report, did you read any
16 research on how to apply the brand identity system
17 framework?

18 A. I read Erich's book. Well, I read David
19 Aaker's book with Erich.

20 Q. In your analysis under the brand identity
21 system, you're operating assumption was that the
22 proper time frame within which to analyze the LUSH
23 brand is 2003, 2004, correct?

24 A. Correct.

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1 Q. And these paragraphs critique Dr.
2 Joachimsthaler for not properly reviewing data and
3 opining on 2003 to 2004 specifically, correct?
4 A. Correct.

5 Q. Looking at paragraphs 19 through 20, is the
6 basis for your opinions in paragraphs 19 through 20,
7 is that based on your expertise in marketing or
8 simply the law provided by counsel?

9 A. No. I would say 19 and 20, again, what I'm
10 doing is all I'm doing is cataloguing all the data in
11 the Erich's report by time.

12 Q. Um-hmm.

13 A. So that's what I did.

14 Q. And you did that based on the assumption that
15 2003 to 2004 is the relevant time period to look at
16 the LUSH brand for this framework?

17 A. Yes.

18 Q. But this cataloguing, that could be done by
19 anybody, it doesn't need to be a marketing expert,
20 correct?

21 A. No. I would say you would probably need to
22 have a level of marketing expertise to catalog the
23 right information under the right headings. Right.
24 So brand as organization, brand as person.

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1 Q. Understood. Understood.

2 But to create this table and to say that the
3 data wasn't from 2003 to 2004, that doesn't take a
4 marketing expert to do that specific task, correct?
5 I could do that myself, right?

6 A. I'm going to say you need some level of
7 expertise in marketing to do it.

8 Q. And why is that?

9 A. Again, because I think you need to evaluate
10 what he wrote in addition to the data he relied upon.

11 Q. And where in paragraphs 19 and 20 are you
12 evaluating what Dr. Joachimsthaler wrote?

13 A. So I'm taking his quotes and trying to
14 understand if he's talking about brand as
15 organization, what elements is he using in his report
16 that are tied to brand as organization, and then what
17 data is he using to support brand as organization.

18 Q. Let's move to page 7, about the brand value
19 proposition.

20 Are you familiar with this framework?

21 A. Yes.

22 Q. In what way?

23 A. So there's, again, a rich literature on the
24 elements of this framework in branding.

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1 Q. And had you -- prior to working on this case,
2 had you ever applied that framework before in your
3 report?

4 A. So I've applied the elements of this
5 framework.

6 Q. Each one of the elements?

7 A. Yes.

8 Q. And what's the difference between the brand
9 value propositions framework and the brand identity
10 system framework in your opinion? When would you use
11 one versus the other?

12 A. Well, I think they give you different -- they
13 give you different things. So I think, you know, you
14 could use both, because there may not be a lot of
15 overlap, at least as listed by Erich and David Aaker
16 from their frameworks.

17 Q. So you said they give you different things.

18 What does the brand value proposition, what
19 different conclusions does that reach, separate aside
20 from these reports in this case, just generally, what
21 different conclusions does the brand value
22 proposition framework reach as opposed to the brand
23 identity system framework?

24 A. Again, I don't think the conclusions need to

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1 be different, they just have different elements. So
2 as we can see, functional, emotional,
3 self-expressive, those are not picked up explicitly
4 in the BIS.

5 Q. So they're just two different frameworks to
6 kind of get to the same place?

7 A. Or at least could be applied in different
8 ways. They may or may not get you to the same place.

9 Q. So the brand value proposition framework
10 could also be used as a way to audit a brand?

11 A. Yeah. I would say as a way to evaluate a
12 brand.

13 Q. Evaluate a brand.

14 And your opinions in this section of your
15 report are focused on the criticism that Dr.
16 Joachimsthaler's analysis of the brand value
17 proposition focuses on the wrong time frame; is that
18 correct?

19 A. That's correct.

20 Q. Anything else in this section of your report?

21 MR. CRANE: Objection.

22 BY MS. KLIENBENSTEIN:

23 Q. And I'll be specific for you.

24 A. Thank you.

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1 relates to this, correct.

2 Q. Yeah. I'm just trying to make sure we're on
3 the same page with the words that we're using.

4 So what the brand means, how it's viewed by
5 consumers, that's not the same thing as the strength
6 of the brand. I understand they may be related. But
7 they're not the same thing, right?

8 A. I don't know if it's not the same thing. I
9 mean, this was one framework in a Erich used to
10 assess strength of the brand.

11 THE WITNESS: If it's okay, I'm
12 going to use the restroom only because
13 I didn't use it on the last break.

14 MS. KLIENBENSTEIN: Sure.

15 THE WITNESS: Thanks.

16 (Recess taken.)

17 BY MS. KLIENBENSTEIN:

18 Q. Let's move to the third framework starting at
19 paragraph 43 on page 9.

20 Are you familiar with the framework that Dr.
21 Joachimsthaler used for analyzing whether the LUSH
22 brand is a lifestyle brand?

23 A. So I'm familiar with lifestyle branding.

24 Q. And the question is are you familiar with the

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1 framework that he used to analyze whether LUSH is a
2 lifestyle brand?

3 A. So I'm not really sure he used a framework.
4 I called it a framework because he called it a
5 framework. But there are elements of a lifestyle
6 brand. But, anyway. So I'm familiar with lifestyle
7 brand.

8 Q. Do you disagree with the elements that Dr.
9 Joachimsthaler used to analyze whether LUSH is a
10 lifestyle brand? Setting aside the conclusions.

11 A. No. I think some of the elements he has in
12 there are probably elements you would want to
13 consider.

14 Q. And looking at paragraphs 43 through 47, your
15 opinions in those paragraphs are that Dr.
16 Joachimsthaler used the wrong time frame again?

17 A. That's correct.

18 Q. That he should have analyzed whether LUSH was
19 a lifestyle brand in 2003, 2004, correct?

20 A. Correct.

21 Q. In paragraph 43, you used the phrase
22 "demanding criteria."

23 Do you see that?

24 A. I do.

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14 BY MS. KLIENBENSTEIN:

15 Q. Understood. So moving on to page 11, looking
16 at subsection 4.

When you're looking at whether a brand can extend into different categories of products or services, what framework do you use to make that analysis?

21 A. Again, I don't think that there's, you know,
22 a number of frameworks out there. So, again, Erich
23 has -- and I labeled it as a framework. But there's
24 elements that are here that are probably elements

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1 that I would also use to look at is a brand
2 extendable.

3 Q. So you don't have any quarrel with the
4 framework that Dr. Joachimsthaler used, correct?

5 MR. CRANE: Objection. Misstates
6 his testimony.

7 BY MS. KLIENBENSTEIN:

8 Q. Just the conclusion.

9 A. So I don't have a quarrel with the elements
10 and things that he used to understand, you know,
11 could a brand be able to extend.

12 Q. And looking at paragraphs 48 through 53, your
13 critique in these paragraphs is that Dr.
14 Joachimsthaler analyzed the brand extension concept
15 in the wrong time period, correct?

16 A. Correct.

17 Q. No other opinions in this section, correct?

18 A. No.

19 Q. When you're analyzing the extendibility of
20 the brand, what data do you look at?

21 A. So as I said, I would probably use similar
22 elements to Erich, and then try and collect secondary
23 and primary data to see if there's, you know, the
24 ability to extend is there.

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1 different analysis for a different
2 brand may come up with a different
3 conclusion.

4 MS. KLIENBENSTEIN: I don't think
5 I have any other questions. Let me
6 double check. All right. That's all
7 that I have.

8 THE WITNESS: Thank you.

9 (discussion off the record.)

10 MS. KLIENBENSTEIN: So we're going
11 to allow the witness to read and sign,
12 and he'll do so within a two-week turn
13 around time after when he gets the
14 final transcript.

15 MR. CRANE: All right.

16 (WHEREUPON, the deposition was concluded
17 at 1:40.)

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1 C E R T I F I C A T E
2

3 COMMONWEALTH OF MASSACHUSETTS)

4 ESSEX, SS.)

5
6 I, Maria P. Manning, CSR and Notary Public in
7 and for the Commonwealth of Massachusetts, do hereby
8 certify that there came before me on the 21st day of
9 October, 2016, at 10:03 a.m., the person hereinbefore
10 named was duly sworn by me and that such deposition
11 is a true record of the testimony given by the
12 witness.

13 I further certify that I am neither related to
14 nor employed by any of the parties or counsel to this
15 action, nor am I financially interested in the
16 outcome of this action.

17 In witness whereof, I have hereunto set my hand
18 and seal this 4th day of November, 2016.

19

20

21

22 Notary Public

23 My Commission Expires

24 January 6, 2017

1 **ERRATA SHEET DISTRIBUTION INFORMATION**

2 **DEPONENT'S ERRATA & SIGNATURE INSTRUCTIONS**

3

4 **ERRATA SHEET DISTRIBUTION INFORMATION**

5

6 The original of the Errata Sheet has been
7 delivered to David A. Crane, Esq.

8 When the Errata Sheet has been completed by the
9 deponent and signed, a copy thereof should be
10 delivered to each party of record and the ORIGINAL
11 forwarded to Heather J. Kliebenstein, Esq., to whom
12 the original deposition transcript was delivered.

13

14 **INSTRUCTIONS TO DEPONENT**

15 After reading this volume of your deposition,
16 please indicate any corrections or changes to your
17 testimony and the reasons therefor on the Errata
18 Sheet supplied to you and sign it. DO NOT make marks
19 or notations on the transcript volume itself. Add
20 additional sheets if necessary. Please refer to the
21 above instructions for Errata Sheet distribution
22 information.

23

24

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1 ATTACH TO DEPOSITION OF: DR. JONATHAN D. HIBBARD
2 CASE: Pinkette Clothing, Inc. Vs. Cosmetic Warriors
3 Limited
4 DATE TAKEN: 10/21/2016

5 ERRATA SHEET

6 Please refer to Page 117 for Errata Sheet
7 instructions and distribution instructions.

8 Page Line	Correction/Reason
9	_____
10	_____
11	_____
12	_____
13	_____
14	_____
15	_____
16	_____
17	_____

18 I have read the foregoing transcript of my
19 deposition, and except for any corrections or changes
20 noted above, I hereby subscribe to the transcript as
21 an accurate record of the statements made by me.

22 Executed this _____ day of _____, 2016.

23 _____
24 DR. JONATHAN D. HIBBARD